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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. [redacted] 93

JACK GALTER, DORA M. GALTER,
WILLIAM R. GALTER and ARNOLD F. SHAPIRO,
Petitioners,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The Scheffer Press, Inc.—ANdover 3-6850

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The petitioners, Jack Galter, Dora M. Galter, William R. Galter and Arnold F. Shapiro, respectfully pray for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Seventh Circuit, entered March 4, 1951, modifying in some respects, disapproving in some respects, and approving and affirming in some respects a cease and desist order of the Federal Trade Commission issued against petitioners and others on August 14, 1947.

The petitioners, being residents of Chicago, Illinois, and within the Seventh Circuit, invoked the jurisdiction of the United States Circuit Court of Appeals for said Circuit by

filing therein their petition to review said cease and desist order.

On Feb. 5, 1951, said Circuit Court rendered an option by Lindley, District Judge modifying, disapproving and approving said cease and desist order, a copy of which said opinion is set forth in the appendix hereto. On March 4, 1951 said Circuit Court entered its final decree.

Basis for the Jurisdiction of this Court to Review the Judgment in Question.

The jurisdiction of this Court is invoked under Section #1254 of Title 28 U.S.C.A.

Said decree of the Circuit Court is subject to review by this Court upon certiorari, as provided in Section 1254 of Title 28 U.S.C.A.

This petition is filed within the time provided by Section 2101 of Title 28, U.S.C.A.

Summary of Matter Involved.

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on February 4, 1941 issued and served its complaint in this proceeding upon petitioners and others, charging them with unfair methods of competition in interstate commerce (R. 2). After the filing by the petitioners and certain other defendants of their answers to the complaint (R. 24, 33), certain testimony and other evidence in support of and in opposition to the complaint were introduced before a Trial Examiner of the Commission.

Subsequently, and before the introduction of evidence in the proceedings had been completed, certain Stipulations of Fact were entered into between the petitioners and counsel for the Commission, which Stipulations provided

that, *subject to the approval of the Stipulation by the Commission,* the facts set forth therein might be taken as facts in the proceedings and in lieu of testimony in support of or in opposition to the complaint, and that the Commission might proceed upon such Stipulation of Facts and upon the evidence theretofore introduced, to make its report, stating its findings as to the facts (including inferences which it might draw from the stipulated facts and its conclusion based thereon), and enter its order disposing of the proceedings, without the presentation of oral argument or the filing of briefs (R. 47, 56).

Thereafter the proceedings regularly came on for final consideration by the Commission upon the Record, including the complaint, answers, Stipulation of Facts and testimony and other evidence, and the Commission entered its Cease and Desist Order dated August 14, 1947 (R. 158).

Subsequently thereto, the petitioners filed before the Federal Trade Commission a petition and a supplemental petition to set aside the order to cease and desist issued by the Commission in the above entitled cause (R. 162, 167).

On January 6, 1950, the Commission issued its order dismissing the petitioners' petition and supplemental petition to set aside the order to cease and desist and to reopen these proceedings (R. 184).

Petitioners subsequently invoked the jurisdiction of the United States Court of Appeals for the Seventh Circuit by filing therein their petition to review said Cease and Desist Order and on March 4, 1951 said Court of Appeals for the Seventh Circuit entered its final Decree which modified said Cease and Desist Order in part, approved said Cease and Desist Order in part, and disapproved said

Cease and Desist Order in part. A copy of said Decree is set forth in the appendix hereto.

The facts are these:

Certain corporations of which petitioners were officers, and petitioners, were engaged in the manufacture, sale and distribution of various items of novelty merchandise, including electric shavers, cameras, electric clocks, and electric lighters.

The names "Elgin", "Underwood", and "Remington" were used by certain corporations of which petitioners were officers, on some of their products. These names were imprinted upon the products and appeared on the cartons in which the products were packaged and sold to the public.

The use of the name "Elgin" was discontinued sometime in 1939, several years prior to the filing of the complaint in this cause (R. 47).

The petition to set aside the cease and desist order alleged that the corporations of which petitioners were officers had discontinued to use of the name "Remington" prior to the filing of the complaint in this cause (R. 164). This allegation was not denied in the Commission's answer and petitioners therefore state herein as a fact that the use of the name "Remington" had been discontinued prior to the filing of the complaint in this cause.

The use of the name "Underwood" was discontinued by the corporations of which these petitioners were officers, in February 1942.

The corporations of which petitioners were officers are no longer existing entities. Of said corporations,

(a) Match King, Inc., an Illinois corporation, was dissolved on November 26, 1943 as a result of voluntary dissolution proceedings brought by its stockholders, officers and directors (R. 162).

(b) Monarch Manufacturing Company, was a trade name used by Match King, Inc. (R. 163).

(c) American Supercraft Corporation, an Illinois corporation was dissolved on December 16, 1943 as a result of voluntary dissolution proceedings brought by its stockholders, officers and directors (R. 163).

None of said corporations have transacted or engaged in any business whatsoever since the respective dates of dissolution above detailed (R. 163).

The Cease and Desist Order was directed against these corporations (R. 161) and petitioners but the Decree of the Circuit Court of Appeals modified said Cease and Desist Order by removing said corporations from the scope of said Order. The Decree of the Circuit Court of Appeals further modified the Cease and Desist Order by deleting from said Cease and Desist Order those provisions restraining petitioners and the now dissolved corporations from the use of the phrase "candid type cameras" in their advertising.

Hearings in this proceeding were held concurrently by the Federal Trade Commission with those held in a companion proceeding before the Commission entitled "*Paris Bead and Novelty House, Inc. et al.* (Docket 4457), the respondents there being jobbers of the products made by the now dissolved corporations of which petitioners were officers.

The evidence that was taken in the *Paris Bead* case applied equally to the petitioners herein and to the now dissolved corporations, and to the respondents in the *Paris Bead* case; respondents in both cases being notified and being present at all hearings, except as hereinafter set forth.

The Stipulation that was entered into by and between counsel for the petitioners herein and the now dissolved

corporations, and counsel for the Federal Trade Commission provided that *no testimony taken after January 28, 1942 would be binding upon the petitioners here and the now dissolved corporations.* Said Stipulation was not signed by the Paris Bead respondents.

Nevertheless hearings were held in joint docket, *viz.*, the *Paris Bead and Novelty House, Inc., et al.,* Docket 4457, and the *Elgin Razor, et al.,* Docket 4458, subsequent to the date of the filing of the Stipulation on to wit: January 29th and 30th, April 13th and 14th, and June 15th, 1942.

These petitioners and the now dissolved corporations were not present at any of said hearings. The Commission subsequently dismissed the complaint against the respondents in Docket 4457.

Questions Presented.

1. Did the Federal Trade Commission abuse its discretion by issuing its Cease and Desist Order based on the alleged wrongful use of the names "Elgin", "Remington", and "Underwood" by the now dissolved corporations of which these petitioners were officers, when

   (a) The corporations of which these petitioners were officers had ceased using the names "Elgin" and "Remington" prior to the filing of the complaint in this cause; and

   (b) The corporations of which these petitioners were officers ceased using the name "Underwood" from the time the Stipulation of Facts was entered into in February 1942.

2. Did the Federal Trade Commission abuse its discretion by issuing its Cease and Desist Order as to the use of the names "Elgin", "Remington" and "Underwood" and as to the other activities complained of by reason of

the five-year time interval between the date of the last hearing, and the date of the Cease and Desist Order, during which interval petitioners committed none of the acts complained of?

3. Did the Federal Trade Commission violate due process by (a) holding hearings without notice which affected petitioners? (b) failing to disclose to petitioners testimony taken in the companion docket which was favorable to petitioners?

Reasons for Allowance of Writ.

1. The Circuit Court in this case has decided a Federal question in a way probably in conflict with an applicable decision of this Court, to wit:

The decision of the Court of Appeals that:

> "in determining whether the commission has abused its discretion in ordering a petitioner to desist from an unfair practice which he has already halted, the Court is concerned largely, not with the period of time which has elapsed between the cessation and the entry of the order, but with the time from the date of cessation to the date of issuance of the complaint"

appears to be in conflict with the decision of this Court in *United States* v. *U. S. Steel Corp.*, 251 U. S. 417 (1919) which held that the Court is concerned both with the period of time which has elapsed between the cessation and the entry of the order, and with the time from the date of cessation to the date of issuance of the complaint.

2. That the decision of the Court of Appeals in this case holding that it is a matter of discretion with the Commission as to the issuance of a Cease and Desist Order, despite cessation of the complained activities prior to the complaint, appears to be in conflict with the decision of the United States Court of Appeals for the Sixth Circuit

in *Federal Trade Commission* v. *Civil Service Training Bureau,* 79 Fed. (2d) 113, 116, in which that Court held:

> "The Commission is not authorized to issue a Cease and Desist Order as to practices long discontinued and as to which there is no reason to apprehend renewal."

The decision of the Court of Appeals for the Seventh Circuit also appears to be in conflict with the decision of the United States Court of Appeals for the Third Circuit in *John P. Winston* v. *Federal Trade Commission,* 3 Fed. (2d) 961 (1925) where the Court said:

> "Whether the method of sale first pursued by the company and then abandoned on the suggestion of the Commission was an unfair method of competition, is a question which in the circumstances is more academic than real and therefore is one on which we do not feel called upon to express an opinion. It will be enough to say that the evidence shows that the company itself had ceased and desisted from the practice before the Commission had filed the complaint *and on this evidence the order of the Commission to cease and desist from doing what the company had already ceased and desisted from doing and what it offered to stipulate never to do again, cannot be sustained.*" (Italics ours.)

3. That the United States Court of Appeals for the Seventh Circuit has so far sanctioned the departure from the accepted and usual course of judicial proceedings required by the Federal Trade Commission Act and by the due process requirement of the Constitution of the United States as to call for the exercise of this Court's power of supervision.

The Stipulation of Facts, although signed by counsel for petitioners and counsel for the Commission, had not been approved by the Commission at a time when hearings were held in joint Dockets 4457 and 4458. Petitioners did

not attend any of these hearings and no notice that these hearings would be held after the Stipulation had been signed was given petitioners. The Stipulation not being approved by the Commission, the holding of said hearings before said approval and without notice to the petitioners was a grievous departure from the accepted and usual course of proceedings by the Federal Trade Commission and was a violation of due process.

(a) When the Commission did not give notice of the hearing it was treating the proceeding before it as a class action, and as such the ultimate finding on the question of the names "Elgin", "Remington", and "Underwood" should have been decided the same way in both the *Paris Bead* case, Docket 4457 and petitioner's case, Docket 4458.

(b) The failure of the Trial Examiner to inform the petitioners of the Paris Bead testimony, which was favorable to the position of the petitioners, was in violation of his judicial function much like the duty of the prosecutor to disclose facts to the Court affecting the innocence of the accused in a criminal case.

Wherefore petitioners pray for the issuance of a Writ of Certiorari to said United States Court of Appeals for the Seventh Circuit in conformity with the applicable Acts of Congress and the Rules of the Supreme Court of the United States; and that upon the consideration of this petition, said Writ be allowed.

HENRY H. KOVEN,
Counsel for Petitioners.

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BRIEF IN SUPPORT OF PETITION.

Jurisdiction of the Court.

The grounds for the jurisdiction of this Court are set forth in the petition (p. 1).

Erroneous Statement of Facts in Opinion of the United States Court of Appeals for the Seventh Circuit.

In its opinion of February 5, 1951 the Court made certain erroneous statements of fact. We deem it important to call the attention of this Court to some of these erroneous statements:

1. In its opinion (Appendix 4a) the Court said:

> "If these allegations are accepted as true, the result is that the use of two of the three names is not shown to have been discontinued until more than a year after issuance of the complaint. * * *"

Petitioners discontinued the use of the name "Elgin" in 1939 (R. 47). Petition to set aside the Cease and Desist Order alleged that petitioners had discontinued the use of the name "Remington" prior to the filing of the complaint in this cause (R. 164). This allegation was not denied in the Commission's answer. The rule is basic that every allegation not explicitly denied shall be deemed admitted. It is clear, therefore, that whereas the Court of Appeals for the Seventh Circuit stated that two of the three names were not shown to have been discontinued until after the issuance of the complaint, the fact is that the use of two of the three names were discontinued *prior to the issuance of the complaint.*

2. In its opinion the Court of Appeals for the Seventh Circuit states (Appendix 4a):

> "And though petitioners have asserted abandonment of a practice, they still contend in this Court that they have a right to continue it."

There is nothing in the Record, the Briefs, and nothing was said on oral argument to warrant the statement of fact by the Court of Appeals for the Seventh Circuit, that petitioners contend that they have a right to continue to use these names. In fact petitioners have long since abandoned use of these names in the manner as heretofore described, and have no intention whatsoever of resuming their use.

ARGUMENT.

I.

The Court of Appeals for the Seventh Circuit in this case had decided a federal question in a way probably in conflict with an applicable decision of this Court.

The Federal Trade Commission should not issue a Cease and Desist Order against activities voluntarily discontinued well before the issuance of the complaint, where the resumption of the activities is unlikely. The United States Supreme Court has stated the test in the case of *United States* v. *U. S. Steel Corp.*, 251 U. S. 417, at page 445, (1919) where the Court said:

> "Monopoly therefore was not achieved and competition had to be persuaded by pools, associations, trade meetings and through the social form of dinners, all of them it may be, violations of the law, *but* transitory in their purpose and effect. They were scattered through the years from 1901 * * * until 1911, but after instances of success and failure were abandoned *nine months before this suit was brought.* (Italics ours) There is no evidence that the abandonment was in prophecy of or in dread of suit; and the illegal practices have not been renewed, nor is there any indication to resume them, and certainly 'no dangerous probability' of their resumption, the test for which *Swift & Co.* v. *United States,* 196 U. S. 375, at p. 396 is cited."

The essence of the rule that can be drawn from the above case would indicate that where activities have been discontinued prior to the issuance of a complaint, unless there is something akin to a dangerous probability of resumption, the Commission should not issue a Cease and

Desist Order. That the Court of Appeals for the Seventh Circuit should be concerned with the period of time which has elapsed from the date of cessation of the activities complained of, and the date of the entry of the Order, necessarily flows from the dangerous probability doctrine ennunciated by this Court because the length of that time period is a key factor in determining the likelihood of resumption. The Seventh Circuit, however, is not concerned with the dangerous probability of resumption but with the question of whether the activities are surely stopped and they determine the answer to this by examining the period of time from the date of cessation to the date of the complaint. In a case like the one at bar, where five years elapses between the last hearings and the Order to Cease and Desist, *and during that period none of the activities complained of were engaged in,* and where some of the activities have been discontinued prior to the filing of the complaint, the test of the Seventh Circuit is incomplete and in conflict with the test ennunciated by this Court. The Commission says, in all seriousness, that there is nothing in the record to give assurance that petitioners will "surely" not resume use of the name "Elgin", as well as the other trade names, if the Order to Cease and Desist is set aside (Commission's Brief, 12, 13 in the Court of Appeals).

Aside from the death of the individual petitioners, there never would be anything to "surely" give assurance of non-resumption. In this connection, it is important to note that the corporate petitioners all are dissolved and have been since 1943 (R. 162, 163), four years before the Order was entered. The officers of these dissolved corporations are the individual petitioners, *all of whom have long since discontinued all the activities complained of* and the Commission, therefore, should not blind itself

to reality and overlook petitioners' non-use of "Elgin" since 1939, "Remington" since 1941, and "Underwood" since February 7, 1942, even the third of the three names having been discontinued for five years prior to the entry of the Order to Cease and Desist, and the discontinuance of all other activities complained of since 1942.

The Court of Appeals for the Seventh Circuit, in the instant case has, first, erred in its statement of fact that the use of two of the three names was not discontinued until after the issuance of the complaint, when in fact two of the three names were discontinued prior to the issuance of the complaint, but has applied to these facts what we feel to be a misapplication of the doctrine stated in *United States* v. *U. S. Steel Corp., supra,* where the Court felt that equal emphasis should be given to the time prior to the issuance of the complaint the activities were discontinued and whether there is a dangerous probability of their resumption.

The substantial time between the date of the cessation of activities and the date of the entry of the Order to Cease and Desist, during which none of the activities complained of were resumed, all point to the fact that there is no likelihood of resumption of these activities, let alone, a dangerous probability of a resumption of said activities.

It is submitted that the Federal Trade Commission has abused its discretion in this case and that the Court of Appeals was in error in not requiring the Commission to re-open the proceedings in accordance with the petitioners' request, so that testimony might have been heard as to whether there was any dangerous probability or likelihood of renewal of the activities complained of.

The substantial time-lag between the Stipulation of Facts in 1942 and the entry of the Order in 1947, some

five years later, should in itself be grounds for a reversal of part of all of the Cease and Desist Order.

Certainly it cannot be in the public interest to have the Cease and Desist Order issued *in vacuo* against dissolved corporations, as to activities voluntarily discontinued, and against petitioners who have not engaged in said activities for a period of some six years. Cease and Desist Orders carry an air of opprobrium, and, like injunctions, should not be issued where not required.

II.

The decision of the Court of Appeals for the Seventh Circuit in this case, appears to be in conflict with the decisions of the Courts of Appeal for the Third and Sixth Circuits.

The cessation of activities problem can be divided into three parts:

(1) The Court could come to the conclusion that if activities were ceased prior to the issuance of a complaint the Federal Trade Commission should have no discretion as to the issuance of a Cease and Desist Order and that any Cease and Desist Order entered in such circumstances should be subject to reversal;

(2) The Court could come to the conclusion that where activities are discontinued prior to the issuance of the complaint, the Commission should have discretion as to whether or not a Cease and Desist Order should be issued, such discretion, however, to be limited by the "dangerous probability" as to whether such activities would be resumed; and

(3) Where the activities are discontinued prior to the issuance of the complaint, the Commission should have unlimited discretion, with no guiding standard as to whether the Cease and Desist Order should be entered.

The Third and Sixth Circuits appear to be applying the doctrine as enunciated in (2) above, *viz.*, that where the activities complained of are discontinued prior to the issuance of the complaint, that the entry of a Cease and Desist Order, is subject to reversal if there is no likelihood or dangerous probability of a resumption of said activities.

Both Courts emphasize strongly the likelihood of renewal. Thus the Court in the Third Circuit said in the case of *John P. Winston* v. *Federal Trade Commission,* 3 F. (2nd) 961, at p. 962 (1925):

> "Whether the method of sale first pursued by the company and then abandoned on the suggestion of the Commission was an unfair method of competition, is a question which in the circumstances is more academic than real and therefore is one on which we do not feel called upon to express an opinion. It will be enough to say that the evidence shows that the company itself had ceased and desisted from the practice before the Commission had filed the complaint and on this evidence the order of the Commission to cease and desist from doing what the company had already ceased and desisted from doing and what it offered to stipulate never to do again, cannot be sustained."

And the Court in the Sixth Circuit said in the case of *F. T. C.* v. *Civil Service Training Bureau,* 79 F. (2nd) 113, 116 (1935):

> "The Commission is not authorized to issue a Cease and Desist Order as to practices long discontinued and as to which there is no reason to apprehend renewal."

We have not found any case where the Court held that the Commission should have no discretion whatsoever (which is the possibility outlined in (1) of this Argument

although the *Winston* case may hold this). The Court of Appeals for the Seventh Circuit, however, has adopted the doctrine that the Commission should have unlimited discretion. Thus in the case of *Eugene Dietzgen Co.* v. *Federal Trade Commission,* 142 F. (2nd) 321 (1944) the Court for the Seventh Circuit said at page 330:

> "*Effect of secession of practice condemned by order, before entry of order.* (Court's Italics) Dietzgen Co. contends separately and especially, that the order should not have been entered as to it, because it resigned from S.A.M.A. on March 4, 1938. A petitioner's discontinuance of acts which are subsequently found to be illegal has been held not to bar the issuance of a Cease and Desist order. It has also been so held in the analogous field of the National Labor Relations Act, 29 U.S.C.A., Sec. 151 *et seq.* The propriety of the order to cease and desist and the inclusion of a respondent therein, must depend on all the facts which include the attitude of respondent toward the proceedings, the sincerity of its practices and profession of desire to respect the law in the future and all other facts. *Ordinarily the Commission should enter no order where none is necessary. This practice should include cases where the unfair practice had been discontinued.* (Italics ours) On the other hand, parties who refused to discontinue the practice until proceedings are begun against them and proof of their wrong doing obtained, occupy no position where they can demand dismissal. The order to desist deals with the future, and we think it is somewhat a matter of sound discretion to be exercised wisely by the Commission when it comes to entering its order. The object of the proceedings is to stop the unfair practice. *If the practice has been surely stopped and by the act of the party offending, the object of the proceedings having been obtained, no order is necessary or should one be entered.* If, however, the action of the wrongdoer does not insure a cessation of the practice in the future, the order to desist is appro-

priate. We are not satisfied that the Commission has used that discretion in the instant case."

Here the emphasis is whether the practice has been "surely stopped". That the Court favors giving the Commission unlimited discretion is clearly shown by the following extract from the preceding quotation:

> "On the other hand, parties who refused to discontinue the practice until proceedings are begun against them and proof of their wrong doing obtained, occupy no position where they can demand dismissal. The order to desist deals with the future, and we think it is somewhat a matter of sound discretion to be exercised wisely by the Commission when it comes to entering its order."

There is nothing in the opinion of the Seventh Circuit in the *Dietzgen* case, *supra,* which gives any clue as to what criteria the Commission should adopt in determining whether the Cease and Desist Order should be entered. What does "surely stopped" mean? If, as in the instant case, the petitioners have discontinued the activities complained of, prior to the complaint, and five years elapse between the last hearing and the Order, it is submitted that the Seventh Circuit has given *carte blanche* authority to the Commission as to the issuance of Cease and Desist Orders in situations like the one in the instant case.

And in *Fort Howard Paper Co.* v. *Federal Trade Commission,* 156 F. (2d) 899 (1946) the Seventh Circuit stated as follows:

> "Dennison and Ryburn place great reliance upon their withdrawal from the Association long before the F. T. C.'s investigation ever began. Such withdrawal, while of some persuasive import, does not negative the continued adherence to all the trade practices and zone systems theretofore in existence which resulted in substantially identical delivered prices. We do not

feel theirs are cases of such good cessation of illegal activities as denies the Commission of the power to issue a Cease and Desist Order."

It is true that the Seventh Circuit, in its decisions, says it was concerned with the question as to whether the Commission abused its discretion.

Said concern however can be of little moment because the practical effect of the theory of the Seventh Circuit that they are largely concerned, not with the period of time which has elapsed between the date of the cessation of the activities complained of and the date of the entry of the Order, but with the time from the date of the cessation to the date of issuance of the complaint, is they disregard the dangerous probability doctrine or likelihood of resumption test, and thereby give to the Commission unlimited discretion. This, it is submitted, is both unwise and in conflict with the doctrine of the Third and Sixth Circuit Courts of Appeal.

III.

The United States Court of Appeals for the Seventh Circuit has sanctioned the departure from the accepted and usual course of judicial proceedings by the Federal Trade Commission in depriving petitioners of a full hearing as required by Section 5 of the Federal Trade Commission Act and by the due process requirement of the Constitution of the United States so as to call for the exercise of this Court's power of supervision.

(a) The Federal Trade Commission violated due process by holding hearings which affected petitioners, without notice to petitioners. Hearings were held in the companion case, *Paris Bead and Novelty,* subsequent to the signing of the Stipulation on to wit January 29th and 30th, April 13th and 14th and June 15th, 1942, and at such hearings, Respondents in the *Paris Bead and Novelty* case intro-

duced testimony into evidence which clearly rebutted certain vital portions of the Stipulation between the Commission and these petitioners. Said testimony and evidence offered by the Respondent, Paris Bead and Novelty House, Inc., et al., indicated almost indisputably that the names "Elgin", "Remington" and "Underwood" were not *per se* the property of the Elgin Watch Company, Remington Typewriter Company and Underwood Typewriter Company (R. 98ff.) but that such names were in common use and by reason of this, there was little likelihood of confusion resulting from petitioners using said names.

The Stipulation, although signed by counsel for petitioners, and the counsel for the Commission, had not yet been approved by the Commission and it was not so approved until August 5, 1947. Although these hearings had originally been scheduled, petitioners, relying on the Stipulation, believed that no further testimony regarding them would be held at any future hearings that might be held. Consequently they did not attend any of said hearings. The Stipulation, not being approved by the Commission, the holding of said hearings before said approval and without notice to the petitioners, was a clear violation of due process. The cases are legion in their requirement of notice. See Gellhorn, Administrative Law (1947) Chapter 3.

The Commission failed to consider the facts presented at said hearings which rebutted the Stipulation. If the Commission did not intend to give notice of the hearing, then in effect it was treating the proceeding as a class action and as such the same result should have been reached in the *Paris Bead* case as was reached in the instant case. The decision of the Commission in the *Paris Bead* case (see Commission's Brief in the Court of Ap-

peals) dismissing the proceedings against the Paris Bead respondents, stated that it was proceeding on the theory that the respondents in the *Paris Bead* case were jobbers. This, of course, is a "boot strap" type of argument. The Court of Appeals, in its decision in the instant case, argued that there was no denial of due process, saying:

> "* * * for there is, in the record, nothing to indicate that the Commission violated that provision of the stipulation by which it agreed that it would consider only the facts stipulated and the evidence already taken, in disposing of the case, and to argue that the Commission's adherence to its agreement with petitioners constituted a denial of due process to them is to take an obviously untenable position."

This, it is submitted, is reasoning in a circle. One of two things should have been done by the Commission. If it did not consider the evidence that was presented at the Paris Bead hearings then the Stipulation, *not having been approved,* the Commission should have disregarded the Stipulation, treated the proceedings as a class action, and found the same way in both the *Paris Bead* and the instant case. It is submitted that the only way that the due process requirement could have been satisfied, in the instant case, was to have notified the petitioners that evidence favorable to their position had been presented; at that point, the petitioners having been notified, and the Stipulation not having yet been approved by the Commission, the petitioners could have withdrawn from the Stipulation.

(b) The Trial Examiner of the Federal Trade Commission violated his judicial function by failing to inform petitioners of the testimony in the *Paris Bead* case. The question as to what the nature of the duty of the Trial

Examiner in an Administrative Board case is, raises the fundamental problems which underlie the nature of administrative law. A legion of learned articles have been written in which all the pros and cons as to administrative law have been dwelled upon. What the Federal Trade Commission did, in the instant case, however inadvertent, must give a full measure of satisfaction to those who have been severe in their criticism of administrative law.

It is submitted that if a comparable situation occurred in a court of record a judge would have advised petitioners that evidence favorable to their position was being submitted, giving the petitioners the opportunity to withdraw from the unapproved stipulation.

If the object of the Federal Trade Commission is to protect the public and not to engage in controversies with individuals where none is necessary, we feel that the Order to Cease and Desist, in the instant case, was not in the public interest and that, in addition, the conduct of the Commission did not satisfy either the layman's or the lawyer's sense of fair play, and was in violation of the cardinal doctrine of due process.

For the several reasons herein presented, it is deferentially urged that the Writ of Certiorari be allowed.

Respectfully submitted,

HENRY H. KOVEN,
Counsel for Petitioners.

APPENDIX.

OPINION OF THE COURT.

Before KERNER, DUFFY and LINDLEY, *Circuit Judges.*

LINDLEY, *Circuit Judge.* Petitioners seek to review and set aside a cease and desist order entered against them pursuant to a complaint charging them with unfair methods of competition and unfair and deceptive acts and practices in commerce, in violation of the Federal Trade Commission Act, 15 U.S.C.A. 45. The Commission issued the complaint on February 4, 1941, after which this proceeding was consolidated for trial with another in which the respondents were jobbers who purchased for resale certain electric razors and cameras manufactured by petitioners. Joint hearings were held from time to time until February 27, 1942, when petitioners and the attorneys for the Commission entered into a stipulation, whereby it was agreed that, subject to the approval of the Commission, the facts stated therein might be made a part of the record and "that upon such facts and upon the testimony and evidence already taken," the Commission might dispose of the proceeding. Between the date of signing the stipulation and its approval by the Commission, further hearings were held in the consolidated proceeding, at none of which petitioners were represented. The Commission, however, in making its findings, says that it did not rely upon the evidence adduced at these further hearings but considered only the stipulated facts, and such evidence as had been received prior to the date of the stipulation. The Commission, on August 14, 1947, entered its cease and desist order, whereupon petitioners filed their petitions to set aside the order or, in the alternative, to reopen the proceeding for the taking of further testimony, both of which were denied.

Although petitioners broadly assert "that the Order to Cease and Desist should be set aside in whole or in part,"

they have not attacked those paragraphs directing them to cease and desist from (1) falsely representing as the customary prices of their products prices in excess of those at which the products are ordinarily sold, (2) falsely representing that the prices at which their products are offered are special or reduced prices or are applicable for a limited time only, or (3) falsely representing that their products are guaranteed against defective workmanship and materials, but have confined their attack to those portions ordering them to cease and desist from (1) using the names "Elgin," "Remington" and "Underwood" on their products, and (2) representing as "candid-type" any cameras not equipped with special lenses and shutters or incapable of taking action pictures under unfavorable light conditions. Since the Commission has joined in the request that the court modify the order by striking those paragraphs relating to the representation of petitioners' cameras as "candid-type" cameras, the issue before this court is as to the validity of that portion of the order which directs that petitioners cease and desist from using the names "Elgin," "Remington" and "Underwood."

In support of their contention that the prohibition against their use of the three names should be set aside, petitioners, asserting that their use of the names has been long since discontinued, cite *Federal Trade Commission* v. *Civil Service Training Bureau*, 79 F. 2nd 113, 116 (CA-6), in which the court held that "The commission is not authorized to issue a cease and desist order as to practices long discontinued, and as to which there is no reason to apprehend renewal. *L. B. Silver Co.* v. *Federal Trade Commission* (CCA) 292 F. 752; cf. *United States* v. *U. S. Steel Corp.* 251 U. S. 417, 445, 40 S.Ct. 293, 64 L. Ed. 343, 8 A.L.R. 1121." This court, in *Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F. 2nd 321, in considering the effect of the cessation of an unfair practice, indicated that it also was of the opinion that the Commission should not ordinarily enter an order in cases where the unfair practice condemned in the order had been discontinued, but went on to say, at page 330: "On the other hand,

parties who refused to discontinue until proceedings are begun against them and proof of their wrongdoing obtained, *occupy no position where they can demand a dismissal.* The *order to desist* deals with the future, and we think it is somewhat *a matter of sound discretion to be exercised wisely by the Commission* * * * We are not satisfied that the Commission abused that discretion in the instant case." (Emphasis supplied.) This language, when considered in conjunction with the decisions of this court which have flatly held that discontinuance of an unfair practice will not of itself necessarily bar issuance of a cease and desist order based thereon, *Fairyfoot Products* v. *Federal Trade Commission,* 80 F. 2nd 684, 686, or justify a court in refusing to enforce such order, *Corn Products Refining Co.* v. *Federal Trade Commission,* 144 F. 2nd 211, 220, means, we think, that, in determining whether the Commission has abused its discretion in ordering a petitioner to desist from an unfair practice which he has already halted, the court is concerned largely not with the period of time which has elapsed between the cessation and the entry of the order but with the time from the date of cessation to the date of issuance of the complaint.

It was stipulated, in the instant proceeding, that petitioners had used the name "Elgin" on their products for three months during the fall of 1939 and that they had manufactured electric razors marked "Underwood" and cameras marked "Remington," the latter having been made for the DeLuxe Products Company and the word "Remington" placed thereon at that company's request.[1] The stipulation is silent as to the exact dates of use of the marks "Underwood" and "Remington," but petitioners, in their petition to set aside the Commission's order, averred that they had not been used "since entering into

[1] Petitioners' argument that this fact somehow absolves them of any responsibility for the use of the name "Remington" is patently without merit, for it is clearly established that one who places in the hands of another a means of consummating a fraud or competing unfairly in violation of the Federal Trade Commission Act is himself guilty of a violation of the Act. **Federal Trade Commission v. Winsted Hosiery Co., 258 U. S. 483; Marietta Mfg. Co. v. Federal Trade Commission, 50 F. 2nd 641, 642 (CA-7); Perloff v. Federal Trade Commission, 150 F. 2nd 757, 759-760 (CA-3).**

the Stipulation as to the Facts in February, 1942 * * *." If these allegations are accepted as true, the result is that the use of two of the three names is not shown to have been discontinued until more than a year after issuance of the complaint, which does not, in the absence of other evidence, even tend to prove that the discontinuance was voluntary and most certainly does not, in view of the well-settled rule that the mere discontinuance of an unfair practice is of itself no bar to issuance of a cease and desist order based thereon, *Fairyfoot Products Co.* v. *Federal Trade Commission*, 80 F. 2nd 684, 686, (CA-7), *Corn Products Refining Co.* v. *Federal Trade Commission*, 144 F. 2nd 211, 220 (CA-7), warrant a holding that the Commission abused its discretion in entering the order or in declining to set it aside. *Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F. 2nd 321, 330 (CA-7). The improper use of the names in the past was a stipulated fact. And though petitioners have asserted abandonment of the practice, they still contend in this court that they have a right to continue it. They express no intention to refrain from it; they make no promise to do so. Under these circumstances, the commission was fully justified in believing that the claimed cessation of wrongful action was not voluntary but brought about by the commission's proceeding and that, in view of petitioners' continued insistence that they might use each of the three names and the absence of any assertion or proof of intent not to renew their use and of any promise so to do, it was in the public interest to enjoin such use. With such exercise of discretion we may not interfere.

In petitioning the Commission to set aside its order or reopen the proceeding, petitioners urged that they should be released from the stipulation on which the order was based for the reason that "in violation of the terms of the stipulation * * * hearings were held in this cause subsequent to the date of the filing of said stipulation * * * at which hearings evidence adverse to the interests of these respondents was introduced * * *." Before this court, however, petitioners have taken a somewhat different position. Although they contend that holding hearings in the

consolidated cause subsequent to the signing of the stipulation without notice to them constituted a denial of due process, they inconsistently complain that the Commission did not consider the evidence adduced at those hearings which, they say, indicated that a substantial number of the facts stipulated were not true, and urge that, for this reason, the stipulation and, of course, the cease and desist order based thereon, should be set aside by this court. The Commission, although denying that hearings were held in violation of the stipulation or without notice to petitioners, contends that, in any event, petitioners were not prejudiced thereby since none of the evidence received at those hearings was considered in disposing of the proceeding against petitioners; it contends further that the evidence received at those hearings does not show that the facts stipulated are not true.

The express statement in the stipulation that the Commission might render its decision upon the facts stated therein "and upon the *testimony and evidence already taken* in this proceeding" (Emphasis supplied) would hardly seem to constitute an agreement that no more hearings were to be held but would rather indicate that it was contemplated that there would be more hearings but that, if the Commission approved the stipulation, the evidence taken at those hearings would not be considered in disposing of the instant proceeding. Certainly, it is obvious that additional hearings were necessarily held in the proceeding with which the instant proceeding had been consolidated, for the respondents in that proceeding were not parties to the stipulation. Such hearings had, in fact, been scheduled and petitioners notified thereof prior to signing the stipulation. But, even assuming that petitioners had no notice of the hearings and that evidence adverse to their interests was received at those hearings, still there is no denial of due process shown, (for there is, in the record, nothing to indicate that the Commission violated that provision of the stipulation by which it agreed that it would consider only the facts stipulated and the evidence already taken, in disposing of the case, and to argue that the Commission's adherence to its agreement with petitioners constituted a de-

nial of due process to them is to take an obviously untenable position).[2]

There remains petitioners' contention that the evidence received in the companion proceeding subsequent to the signing of the stipulation indicated that a substantial number of the facts stipulated were untrue and required that the stipulation be set aside. The evidence on which they rely revealed that the names "Elgin," "Remington" and "Underwood" were used by companies other than the Elgin Watch Company and the Remington and Underwood Typewriter Companies. This evidence, they say, indicates that the stipulation is incorrect in stating that the names in question are the exclusive property of the aforementioned companies.[3] Assuming arguendo that the evidence did show that the stipulation was erroneous in this respect, we cannot see that petitioners can be benefited thereby, for this is not an action for trademark violation but a proceeding to protect the public against fraud and deception, and the evidence taken in the companion proceeding did not disclose any right in petitioners to use the names "Elgin," "Remington" and "Underwood" in such a manner as to mislead the public into believing that petitioners' products were the products of the Elgin, Remington or Underwood Corporations. Nor does it indicate that the stipulation was erroneous in stating that the Commission had witnesses available who would testify that they had been or would be so misled, and induced, as a consequence thereof, to buy petitioners' products.[4] Thus,

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[2] That the Commission did not consider any evidence taken at the subsequently-held hearings in the consolidated cause is admitted by petitioners themselves and is, in fact, the premise upon which they base their contention that the Commission erred in failing to set aside the stipulation as patently untrue.

[3] Petitioners also state that this evidence accounts for the dismissal of the complaint against the respondents in the companion proceeding, but the dismissal order entered by the Commission in that proceeding clearly indicates that dismissal was predicated on the fact that the respondents had not manufactured or selected the trade names for the products referred to in the complaint or done any of the advertising referred to therein, but were merely jobbers who had purchased the products from the petitioners herein.

[4] The stipulation provided that the Commission might consider these statements and give to them the same credence as if the witnesses were called.

the Commission's order would have substantial support in the evidence even though the statements that the names in question belonged exclusively to Elgin, Remington and Underwood were wholly disregarded.

Petitioners, in their alternative petition to set aside the order or reopen the proceeding, for the first time directed the Commission's attention to the dissolution, late in 1943, of the corporate petitioners American Supercraft Corporation and Match King, Inc., also sometimes known by its trade-name, Monarch Manufacturing Company, their dissolution having been accomplished through voluntary proceedings brought by the stockholders, officers and directors of the respective corporations. This disclosure was made in connection with petitioners' argument that their abandonment of the unfair practices against which the order had been issued made that order unnecessary and improper. Although we have rejected the contention that the order should have been set aside because of such abandonment, the fact that the corporations have been dissolved raises a question as to the propriety of the entry of the order against them.

The Commission argues that Section 157.94, Chapter 32, Illinois Revised Statutes, providing that "The dissolution of a corporation * * * shall not take away or impair any remedy available * * * against such corporation * * * for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within two years after the date of such dissolution," authorizes issuance of a cease and desist order against the dissolved corporations, but the cases interpreting that section and its predecessors are strikingly devoid of even the slightest suggestion that the provision that a dissolved corporation shall, for a limited time after dissolution, be held legally responsible for any *liability incurred prior to dissolution* can be extended so far.

In *Life Association of America* v. *Fassett*, 102 Ill. 315, the Illinois court considered at length the purpose and effect of a statutory provision extending the existence of a dissolved corporation for two years from the date of its dissolution. The court there observed, at page 323: "Upon

the dissolution or civil death of a corporation, all its real estate, by the strict rule of the common law, reverts to the original owners or their heirs, and all its personal estate vests in the Crown, in England, and the State here, and all debts due to or from it are by operation of law extinguished. * * * With a view of mitigating the rigor of the common law with respect to the effects of a defunct corporation, the legislature of this and most, if not all, of the other States of the Union have, by appropriate legislative enactments, provided for a just and equitable distribution of their assets in cases of insolvency, or sudden dissolution from any cause, and our own act on the subject contains a provision which in express terms extends their corporate existence two years from the date of their dissolution, for such purpose." The court concluded, at page 324: "From these and other provisions of the statute it clearly appears that it is a part of the settled policy of the State, at least so far as domestic corporations are concerned, that upon their dissolution, however that may be effected, they shall nevertheless be regarded as still existing for the purpose of settling up their affairs and having their property applied for the payment of their just debts * * *." The influence of this decision on subsequent Illinois cases is noted in the court's opinion in *Evans* v. *Illinois Surety Co.*, 298 Ill. 101, in which, after quoting at length from the *Fassett* case, the court stated, at page 108: "The doctrine of this opinion has never been modified or changed, and in some respects it has been specifically approved in several decisions. *St. Louis and Sandoval Coal Co.* v. *Sandoval Coal Co.*, 111 Ill. 32; *Singer* v. *Hutchinson*, 183 id. 606; *Eau Claire Canning Co.* v. *Western Brokerage Co.*, 213 id. 561; *Commercial Trust Co.* v. *Mallers, supra; Edwards* v. *Schillinger*, 245 Ill. 231."

Although the earlier Illinois statutes were perhaps more explicit in providing for the continued existence of a dissolved corporation for the purpose only of winding up its affairs, it would seem quite evident, in the light of the Illinois cases construing such statutes and the public policy expressed therein, that the current provision does no more than preserve for a two-year period, the corporation's lia-

bility for acts performed by it prior to its dissolution but does not make it subject to an injunction against acts to be performed in the future, especially where, as here, the acts sought to be enjoined are in no way related to the winding up of the corporate affairs and are, therefore, (in view of the Supreme Court's statement, in *Chicago Title and Trust Co.* v. *Wilcox Bldg. Corp.*, 302 U. S. 120, 129, that "The only power left to the corporation * * * (after dissolution) * * * was to finish pending cases begun within two years after its dissolution. With that exception, its corporate powers were ended for all time and for all purposes."), beyond the dissolved corporation's power to perform. Such was the construction accorded the statute by the District Court in *Laning* v. *National Ribbon & Carbon Paper Mfg. Co.*, 40 F. Supp. 1005, the court stating, at page 1006, "It seems to me quite evident that the Legislature intended that the decree dissolving the corporation should terminate its existence absolutely except for the purpose of enabling a creditor to maintain an action against it," and such has been the construction generally accorded statutes extending the existence of a corporation after dissolution, Fletcher Cyc. Corp. Perm. Ed. (1942 Revised Vol.), Sec. 8170. Thus it seems clear that the Commission, when the dissolution of the corporate petitioners was brought to its attention, should have amended its order by striking therefrom the names of the aforementioned corporate petitioners.

The order of the Commission is modified by striking therefrom paragraphs 1 (g) and 5 (f), as requested by the Commission, and by striking therefrom also the names of American Supercraft Corporation and Match King, Inc. In all other respects, and as so modified, the order is approved, confirmed and ordered enforced.

A TRUE COPY:

TESTE:

KENNETH J. CARRICK
Clerk of the United States Court of Appeals for the Seventh Circuit.

FINAL DECREE.

Jack Galter, Dora M. Galter, William R. Galter, Arnold F. Shapiro, Match King, Inc., Monarch Manufacturing Company, a corporation, and American Supercraft Corporation, petitioners herein, having filed in this Court on October 11, 1947, their petition to review and set aside an order to cease and desist entered against them and others on August 14, 1947 by the Federal Trade Commission, respondent herein, in a proceeding before said respondent entitled "In the Matter of Elgin Razor Corporation, et al., Docket 4458", and a copy of said petition having been served on the respondent; and the respondent having thereafter certified and filed herein as required by the Federal Trade Commission Act a transcript of the entire record in said proceeding; and the matter having been heard by this Court on briefs and oral arguments and this Court having thereafter fully considered the matter and having rendered its decision on February 5, 1951, striking paragraphs 1(g) and 5(f) from said order and by striking also the names of American Supercraft Corporation and Match King, Inc., and the Court having affirmed said order of the Federal Trade Commission as thus modified:

Now, Therefore, It Is Hereby Ordered, Adjudged And Decreed that petitioners Jack Galter, individually and as former President of Match King, Inc., a dissolved corporation, Dora M. Galter, William R. Galter, Arnold F. Shapiro, individually and as President of American Supercraft Corporation, a dissolved corporation, and Monarch Manufacturing Company, a corporation, its officers, representatives, agents, and employees, directly or through any corporate or other device in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of electric shavers, cameras, electric sun lamps, talking machines, electric clocks or electric razors or any other merchandise, to forthwith cease and desist from:

(1) Using the name "Elgin", or any simulation thereof, either alone or in connection with other words, to designate, describe or refer to petitioners' products;

(2) Using the name "Remington", or any simulation thereof, either alone or in connection with other words, to designate, describe or refer to petitioners' products;

(3) Using the name "Underwood", or any simulation thereof, either alone or in connection with other words, to designate, describe or refer to petitioners' products;

(4) Representing as the customary prices of petitioners' products prices which are in excess of the prices at which such products are regularly and customarily sold in the normal course of business;

(5) Representing that the prices at which petitioners' products are offered for sale are special or reduced prices or are applicable for a limited period of time only when such prices are in fact the regular and customary prices at which such products are offered for sale in the normal course of business;

(6) Representing, through the issuance of purported "guarantee certificates" or otherwise, that petitioners' products are guaranteed against defective workmanship and materials unless petitioners do in fact repair in accordance with the terms of such guarantee products found to be defective in such respects.

And It Is Hereby Further Ordered, Adjudged And Decreed that within ninety (90) days after the entry of this decree the petitioners shall file with the Federal Trade Commission a report in writing setting forth in detail the manner and form in which they have complied with this decree.

Without prejudice to the right of the United States, as provided in Section 5(1) of the Federal Trade Commission Act, to prosecute suits to recover civil penalties for violations of the aforesaid order to cease and desist here-

by modified, and hereby affirmed and enforced as modified, and without prejudice to the right of the Federal Trade Commission to institute and maintain contempt proceedings for the violation of this decree, this Court retains jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof.

/s/ Otto Kerner
/s/ Walter C. Lindley
United States Circuit Judges.

Filed: March 5, 1951.
Satisfactory as to Form
/s/ Howard R. Koven
/s/ Henry H. Koven

A True Copy
Teste:
(Seal)
Kenneth J. Carrick
Clerk of the United States Court
of Appeals for the Seventh Circuit

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 93

JACK GALTER, DORA M. GALTER, WILLIAM R. GALTER AND ARNOLD F. SHAPIRO, PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (R. 203) is reported at 186 F. 2d 810.

JURISDICTION

The judgment of the Court of Appeals was entered on March 5, 1951 (R. 215) and the petition for a writ of certiorari was filed on June 2, 1951.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission abused its discretion in ordering petitioners to cease and desist from an unfair trade practice which had been discontinued, in part, prior to the entry of the order and, in part, prior to the filing of the complaint.

2. Whether petitioners were deprived of a fair hearing.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 717, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U.S.C. 45, provides in part as follows:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.
>
> (b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve

upon such person, partnership, or corporation a complaint stating its charges in that respect * * * * * * *

STATEMENT

In February 1941 the Federal Trade Commission issued a complaint under Section 5 of the Federal Trade Commission Act charging petitioners and certain corporations which they controlled with engaging in unfair practices in promoting the sale of various items of novelty merchandise manufactured by them. The proceeding was consolidated for hearing with a similar proceeding in which the respondents were jobbers who purchased for resale products manufactured by petitioners (R. 203).[1]

In February 1942 petitioners and counsel for the Commission entered into a stipulation providing that, subject to the approval of the Commission, it might decide the proceedings on the facts therein stipulated and the evidence already taken (R. 47-48). In 1947 the Commission, after approving this stipulation (R. 56), entered findings of fact based thereon and on the evidence taken prior to the stipulation (R. 152-157, 204), and entered a cease and desist order prohibiting a number of practices which the Commission found to be in violation of the Federal Trade Commission Act (R. 158-162).

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[1] This proceeding was ultimately dismissed upon the ground that the respondents therein, being jobbers only, had not been parties to the unfair practices charged against them. Order of August 15, 1947, entered in F.T.C. Docket No. 4457.

On petition to the court below for review of the Commission's order, the only provisions of the order which were in issue were those which prohibited petitioners from selling merchandise under the names "Elgin," "Remington" or "Underwood" (R. 204). The stipulated facts pertinent to this prohibition include the following: Petitioners have sold electric shavers and cameras under the brand names "Elgin" and "Underwood" (R. 50). At the request of a customer, petitioners have placed the brand name "Remington" on cameras manufactured for it, knowing that the cameras were to be sold in interstate commerce (*ibid.*). Use of these names has caused members of the public to believe that petitioners' products are those of well known and well established firms, and has induced purchase of petitioners' products in this mistaken impression (R. 55). The period during which petitioners sold or delivered products under the names in question is not set forth, except that it is stated that the name "Elgin" was used during a three-months period in 1939 (R. 50). Petitioners presently assert (Pet. 4) that they discontinued use of the name "Remington" prior to the filing of the Commission's complaint.[2]

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[2] There is no support in the record for the assertion, apart from the statement to this effect made in a petition filed by petitioners requesting the Commission to set aside its cease and desist order, *i.e.*, requesting rehearing (R. 162, 164). The petition also stated that petitioners, since entering into the stipulation as to the facts in February 1942, had not used the name "Elgin" or the name "Underwood" (R. 163-164).

The court below, in an opinion by Judge Lindley, unanimously affirmed the provisions of the Commission's order which were in issue, against the contentions now being pressed by petitioners, namely, (1) that it was an abuse of discretion to issue a cease and desist order against practices discontinued either before the filing of the Commission's complaint or, in any event, some years before entry of the order, and (2) that petitioners did not receive a fair hearing because not given "notice" of the hearings in the consolidated case, which were held after the stipulation signed by petitioners in February 1942, and because the trial examiner failed to advise petitioners of evidence, allegedly favorable to them, adduced at these consolidated hearings (R. 203-208, 211).[3]

ARGUMENT

1. The court of appeals correctly concluded that in the circumstances here the Commission did not abuse its discretion in ordering petitioners to cease and desist from use of the names "Remington," "Elgin" and "Underwood". The court assumed *arguendo,* in petitioners' favor, that use of one of these names had been discontinued prior to the filing of the complaint and that use of the other two

Petitioners assume (Pet. 12) that their statements, not having been controverted in a counter "pleading" by counsel for the Commission, are to be deemed admitted.

[3] The evidence referred to indicates that others besides petitioners have used the trade names involved. Petitioners contend that this evidence indicates that, contrary to the facts which they had stipulated, the public probably would not be misled by petitioners' use of the names (Pet. 21).

names had been discontinued from the time that the stipulation as to the facts had been entered into (R. 206). As the court stated (*ibid.*): "Under these circumstances, the commission was fully justified in believing that the claimed cessation of wrongful action was not voluntary but brought about by the commission's proceeding and that, in view of petitioners' continued insistence, that they might use each of the three names and the absence of any assertion or proof of intent not to renew their use and of any promise so to do, it was in the public interest to enjoin such use."

The Federal Trade Commission's jurisdiction is not confined to persons currently engaged in unfair trade practices. It also has authority to issue a cease and desist order against one who "has been" so engaged (Federal Trade Commission Act, Section 5, *supra*, p. 2). See *Bunte Bros.* v. *Federal Trade Commission*, 104 F. 2d 996, 997-998 (C.A. 7). It is well settled that abandonment of an unfair trade practice or unfair method of competition is not a bar to issuance by the Commission of a cease and desist order.[4]

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[4] *Corn Products Refining Co.* v. *Federal Trade Commission*, 144 F. 2d 211, 220 (C.A. 7), affirmed, 324 U.S. 726; *Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F. 2d 321, 330-331 (C.A. 7), certiorari denied, 323 U.S. 730; *Hershey Chocolate Corp.* v. *Federal Trade Commission*, 121 F. 2d 968, 971-972 (C.A. 3); *National Silver Co.* v. *Federal Trade Commission*, 88 F. 2d 425, 428 (C.A. 2); *Federal Trade Commission* v. *A. McLean & Son*, 84 F. 2d 910, 913 (C.A. 7), certiorari denied, 299 U.S. 590; *Fairyfoot Products Co.* v. *Federal Trade Commission*, 80 F. 2d 684, 686-687 (C.A. 7); *Arkansas Whole-*

The cases cited by petitioner do not reveal a conflict with any decision of this Court or among the circuits. *United States* v. *United States Steel Corp.*, 251 U.S. 417, which involved the principles to be applied in a Sherman Act proceeding seeking dissolution of a corporation by reason of its alleged violation of that Act, is plainly not in point with respect to the scope, or the proper exercise of, the powers vested in the Federal Trade Commission.[5] The two Federal Trade Commission cases cited by petitioners are likewise readily distinguishable. In *John C. Winston Co.* v. *Federal Trade Commission*, 3 F. 2d 961 (C.A. 3), the party proceeded against had stipulated that it would never resume the challenged practice. As the court below noted (R. 206), petitioners have at no time agreed not to use the trade names here involved. On the contrary, they have continued to assert their right to do so.[6] And compare *Hershey Chocolate Corp.* v. *Federal Trade Com-*

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sale Grocers' Ass'n. v. *Federal Trade Commission*, 18 F. 2d 866, 871 (C.A. 8), certiorari denied, 275 U.S. 533; *Fox Film Corporation* v. *Federal Trade Commission*, 296 Fed. 353, 357 (C.A. 2).

[5] In that case the practices complained of were abandoned prior to suit "from a conviction of their futility," not "in prophecy of or dread of suit" (251 U.S. at 445). Here the Commission and the court below were fully warranted in guarding against the possibility that, once the threat of these proceedings was removed, petitioners would resume their unlawful activities.

[6] Petitioners dispute the statement of the court below that they have continued to claim the right to use the trade names (Pet. 12). But petitioners complain (Pet. 21) of the Commission's failure to consider certain evidence (introduced in a collateral proceeding) tending to show that the trade names

mission, 121 F. 2d 968, 971-972 (C.A. 3), a more recent case in the same circuit. In *Federal Trade Commission* v. *Civil Service Training Bureau,* 79 F. 2d 113 (C.A. 6), upon which petitioners also rely (Pet. 17), the court set aside a cease and desist order "as to practices long discontinued, and as to which there is no reason to apprehend renewal" (79 F. 2d at 116). In the present case the Commission and the court below were rightly persuaded that there was reason to apprehend renewal of the improper use of the trade names. Even a casual perusal of the stipulation as to the facts (R. 47-56) reveals a pronounced disposition on the part of the present petitioners to employ unfair and deceptive trade practices.

If petitioners are in good faith in asserting that they now "have no intention whatsoever of resuming" the use of the trade names here involved (Pet. 12), it is difficult to see what injury they will suffer from the proscription which they are presently contesting. On the other hand, it is obvious that the public interest will be seriously prejudiced if this proscription can be avoided merely by discontinuing the unfair trade practices during the pendency of the Commission proceedings.

2. We submit that petitioners' contention that they have been deprived of a fair hearing is frivo-

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involved are in common use; in other words, that petitioners have a right to use these names.

For the effect of a continuing claim of right to engage in the prohibited practice, see *National Silver Co.* v. *Federal Trade Commission,* 88 F. 2d 425, 428 (C.A. 2).

lous. Petitioners in effect assert (1) that they did not participate in the subsequent hearings because, in reliance on the stipulation, they believed that the Commission would decide their case on the stipulated facts and the evidence already introduced; and (2) that the Commission, by doing precisely this, deprived them of a fair hearing. Petitioners, having agreed that the Commission could dispose of the charges against them on the basis of the stipulation and the evidence thus far adduced, can scarcely be heard to complain because the Commission did so.[7]

Even if it be assumed that petitioners should be given the benefit of any favorable evidence adduced at the subsequent hearings in the consolidated proceeding, that evidence does not disprove any essential stipulated fact. The additional evidence relates exclusively to the use of the trade names by others. If, as the stipulation establishes, the public was deceived by petitioners' use of the trade names, the fact that others may have used these names, and thereby deceived members of the public, would not legalize petitioner's conduct. As the court below pointed out, "this is not an action for trademark violation but a proceeding to protect the public against fraud and deception" (R. 208).

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[7] Nor can petitioners seriously assert that they were not notified of the subsequent hearings (Pet. 7, 9, 20) when they admit that the hearings had been "scheduled" and that they deliberately failed to participate in them (Pet. 21).

CONCLUSION

The decision below is correct, there is no conflict of decisions, and no question warranting review is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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